SSN Medicial Products Sdn Bhd v Chin Hin Helmet Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO B-02(NCvC)(W)-1370–07 OF 2018
MARY LIM, HAS ZANAH MEHAT AND NANTHA BALAN JJCA
16 APRIL 2021

Civil Procedure — Damages — Assessment of damages — Appeal against High Court's decision in assessing damages — Whether respondent was allowed to claim for market rental for entire subject premises despite subject premises having illegal structure — Street, Drainage and Building Act 1974 — Uniform Building By-Laws 1984

This was an appeal by the appellant/defendant against the High Court decision in assessing RM2,848,648.80 as damages for wrongful occupation of the premises ('the subject premises') to the respondent/plaintiff. The respondent bought the subject premises through a public auction. At that time, the appellant was already in occupation of the subject premises under a tenancy agreement with the previous owner, a company known as Damai Adil Sdn Bhd ('the previous owner'). The High Court ordered the appellant to deliver vacant possession of the subject premises to the respondent and damages to be assessed up to the date of the delivery of vacant possession. Vacant possession was eventually delivered to the respondent. The appellant then sought an extension of time of one month until 17 April 2016 to remove the machineries, and as requested by the respondent, paid the respondent RM70,000 for the one month extension. The removal of the machineries was completed by 16 April 2016. Hence, the assessment period was only for 20 months and 20 days ('the assessment period'). Two structures constituted the whole subject premises: a five-storey office building and a single-storey warehouse. It was the case of the respondent that the assessment was for the whole subject premises as opposed to the appellant's that the assessment should be confined only to the single-storey warehouse. Before the assessment of damages proceedings, the appellant was not aware that the five-storey building had not been issued with a certificate of fitness ('CF'). Evidence of the witnesses from the local authority, namely the Majlis Bandaraya Petaling Jaya ('MBPJ'), PW1 and PW2 both confirmed that the five-storey office building had not been issued with a CF. His Lordship rejected the appellant's argument: (a) that the appellant did not rent the whole subject premises; and (b) on illegality concerning the part of the building with no CF, which should be excluded from the assessment. The issue for consideration was whether the respondent was allowed to claim for the market rental for the entire subject premises despite the subject premises having an illegal structure under the Street, Drainage and Building Act 1974 ('the Act') and the Uniform By-Law 1984 ('the UBBL').

Held, allowing the appeal:

(1) The High Court did not consider the illegality issue when awarding the property market rental value for the assessment period. The court could not ignore the presence of illegality and the terms of s 24 of the Contracts Act 1950. There was no approval applied for or plan submitted to MBPJ by the owner for the erection of a five-storey building even though there was an earlier approval for a four-storey building. There was also no CF issued after the five-storey building had been erected. The subject premises, which consisted of a five-storey office building, amounted to an illegal structure with no approved plan and CF. The facts on illegality emerged during the oral evidence of the respondent's witnesses from the local authority (MBPJ), namely PW1 and PW2. The appellant was not aware when they entered the tenancy agreement with the previous owner. The respondent should not be allowed to claim for the market rental for the entire subject premises as part of it contained an illegal structure under the Act and the UBBL. His Lordship fell into error when he concluded that the respondent was allowed to claim for the market rental for the entire subject premises, which consisted of the five-storey office building and the single-storey warehouse where the evidence led show that the five-storey building is an illegal structure. The facts of this case fell squarely within the provisions of para 2, (a) and (b) of s 24 of the Contracts Act 1950. The learned judge was in error in awarding RM2,848,648.80 as damages given the illegality and the circumstances. There were merits in the appeal. The user principle relied upon by the respondent did not apply in this case. His Lordship had erred in his findings by not considering the issue of illegality and by accepting the application of the user principle, which warranted appellate intervention (see paras 23–24, 28–29 & 35–39).

[Bahasa Malaysia summary

Ini adalah rayuan oleh perayu/defendan terhadap keputusan Mahkamah Tinggi dalam menilai RM2,848,648.80 sebagai ganti rugi kerana penghunian salah premis ('premis subjek') kepada responden/plaintif. Responden membeli premis subjek melalui lelongan awam. Pada masa itu, perayu sudah menduduki premis subjek di bawah perjanjian penyewaan dengan pemilik sebelumnya, sebuah syarikat yang dikenali sebagai Damai Adil Sdn Bhd ('pemilik sebelumnya'). Mahkamah Tinggi memerintahkan perayu untuk menyerahkan milikan kosong premis subjek kepada responden dan ganti rugi akan dinilai sehingga tarikh penyerahan milikan kosong. Milikan kosong akhirnya diserahkan kepada responden. Perayu kemudian memohon lanjutan masa satu bulan hingga 17 April 2016 untuk membuang mesin, dan seperti yang diminta oleh responden, membayar responden RM70,000 untuk lanjutan satu bulan. Pembuangan mesin selesai pada 16 April 2016. Oleh itu, tempoh penilaian hanya selama 20 bulan dan 20 hari ('tempoh penilaian').

Dua struktur merangkumi keseluruhan premis subjek: bangunan pejabat lima tingkat dan gudang satu tingkat. Adalah kes bagi responden bahawa penilaian itu adalah untuk keseluruhan premis subjek berbanding dengan perayu bahawa penilaian itu hanya terhad kepada gudang satu tingkat. Sebelum prosisidng penilaian ganti rugi, perayu tidak menyedari bahawa bangunan lima tingkat itu belum diberi sijil layak menduduki ('CF'). Keterangan saksi daripada pihak berkuasa tempatan, iaitu Majlis Bandaraya Petaling Jaya ('MBPJ'), PW1 dan PW2 kedua-duanya mengesahkan bahawa bangunan pejabat lima tingkat itu belum dikeluarkan CF. Yang Arif menolak hujahan perayu: (a) bahawa perayu tidak menyewa keseluruhan premis subjek; dan (b) mengenai ketidaksahan berkenaan bahagian bangunan tanpa CF, yang harus dikecualikan daripada penilaian. Isu untuk pertimbangan adalah sama ada responden dibenarkan menuntut sewa pasaran untuk keseluruhan premis subjek walaupun premis subjek mempunyai struktur tidak sah di bawah Akta Jalan, Parit dan Bangunan 1974 ('Akta') dan Undang-Undang Kecil Bangunan Seragam 1984 ('UBBL').

Diputuskan, membenarkan rayuan:

(1) Mahkamah Tinggi tidak mempertimbangkan isu ketidaksahan apabila memberikan nilai sewa pasaran harta tanah untuk tempoh penilaian. Mahkamah tidak dapat mengabaikan kehadiran ketidaksahan dan syarat-syarat s 24 Akta Kontrak 1950. Tiada kelulusan yang dipohon atau pelan yang dikemukakan kepada MBPJ oleh pemiliknya untuk mendirikan bangunan lima tingkat walaupun terdapat kelulusan awal untuk bangunan empat tingkat. Tiada CF yang dikeluarkan setelah bangunan lima tingkat itu didirikan. Premis subjek, yang terdiri daripada bangunan pejabat lima tingkat, adalah struktur yang tidak sah tanpa pelan yang diluluskan dan CF. Fakta mengenai ketidaksahan muncul semasa keterangan lisan saksi responden daripada pihak berkuasa tempatan (MBPJ), iaitu PW1 dan PW2. Perayu tidak menyedari ketika mereka memasuki perjanjian penyewaan dengan pemilik sebelumnya. Responden tidak boleh dibenarkan menuntut sewa pasaran untuk keseluruhan premis subjek kerana sebahagiannya mengandungi struktur tidak sah di bawah Akta dan UBBL. Yang Arif terkhilaf ketika membuat kesimpulan bahawa responden dibenarkan untuk menuntut sewa pasaran untuk seluruh premis subjek, yang terdiri daripada bangunan pejabat lima tingkat dan gudang satu tingkat di mana bukti menunjukkan bahawa lima tingkat bangunan adalah struktur tidak sah. Fakta kes ini jatuh dalam peruntukan perenggan 2, (a) dan (b) s 24 Akta Kontrak 1950. Hakim yang bijaksana adalah salah memberikan RM2,848,648.80 sebagai ganti rugi berdasarkan ketidaksahan dan keadaan. Terdapat merit dalam rayuan tersebut. Prinsip pengguna yang disandarkan oleh responden tidak terpakai dalam kes ini. Yang Arif telah terkhilaf dalam penemuannya dengan tidak mempertimbangkan isu

ketidaksahan dan dengan menerima penerapan prinsip pengguna, yang memerlukan campur tangan rayuan (lihat perenggan 23–24, 28–29 & 35–39).]

Cases referred to

Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd [2018] 5 MLJ 255, CA (refd)
Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors [2005] 2 MLJ 1; [2004] 4 CLJ 309, FC (refd)
Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd [2009] 6 MLJ 1; [2009] 6 CLJ 626, CA (refd)
Lim Kar Bee v Duofortis Properties (M) Sdn Bhd [1992] 2 MLJ 281; [1992] 1 CLJ Rep 173; [1992] 3 CLJ 1667, SC (refd)
Network Foods (M) Sdn Bhd v Syabinas Holdings Sdn Bhd & Anor [1997] MLJU 206; [1997] 4 CLJ 49, HC (refd)
Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd [2016] 3 MLJ 708, CA (refd)
Senga Engineering & Construction Sdn Bhd v Richwin Holdings (M) Sdn Bhd [2016] MLJU 1902; [2016] 7 CLJ 463, HC (refd)
Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd [1980] 1 MLJ 21; [1979] 1 LNS 96, FC (refd)
Tan Kuan Yau v Suhindrimani [1985] 2 MLJ 22, SC (refd)

Legislation referred to

Contracts Act 1950 s 24
Street, Drainage and Building Act 1974 s 33, 70(1), (13)(c), (16)(f)
Uniform Building By-Laws 1984 by-laws 3, 10, 25, 25A, 28
Valuer's Appraisers and Estate Agent Rules 1986 r 76 (2)

Appeal from: Civil Suit No 22NCVC-365–07 of 2014 (High Court, Shah Alam)

Chong Ian Shin (Arulampalam & Co) for the appellant.
HL Teh (HL Teh & Assoc) for the respondent.

Has Zanah Mehat JCA (delivering judgment of the court):

INTRODUCTION

[1] This is an appeal by the appellant/defendant ('appellant') against the High Court decision dated 18 May 2018 in assessing RM2,848,648.80 as damages for wrongful occupation of the premises at No 1 Jalan Tandang 203, off Jalan Tandang Section 51 Petaling Jaya Selangor ('the subject premises') to the respondent/plaintiff ('respondent').

[2] After perusing the appeal records, considering the submissions, both oral and written, we allowed the appeal with costs. We now give our reasons for the same.

BACKGROUND FACTS

[3] The respondent bought the subject premises through a public auction on 13 February 2014. At that time, the appellant was already in occupation of the subject premises under a tenancy agreement with the previous owner, a company known as Damai Adil Sdn Bhd ('the previous owner').

[4] On 5 December 2014, the High Court ordered the appellant to deliver vacant possession of the subject premises to the respondent and damages to be assessed up to the date of the delivery of vacant possession. Having failed to obtain vacant possession, the respondent sought leave to execute the judgment using a writ of possession. The writ was issued on 26 January 2016 and executed on 3 March 2016. Vacant possession was eventually delivered to the respondent on 17 March 2016. The appellant then sought an extension of time of one month until 17 April 2016 to remove the machineries, and as requested by the respondent, paid the respondent RM70,000 for the one month extension. The removal of the machineries was completed by 16 April 2016. Hence, the assessment period is only for 20 months and 20 days ('the assessment period').

[5] Two structures constituted the whole subject premises: a five-storey office building and a single-storey warehouse. Both buildings are attached. It is the case of the respondent that the assessment is for the whole subject premises as opposed to the appellant's that the assessment should be confined only to the single-storey warehouse.

[6] Before the assessment of damages proceedings, the appellant was not aware that the five-storey building had not been issued with a certificate of fitness ('CF'). Evidence of the witnesses from the local authority, namely the Majlis Bandaraya Petaling Jaya ('MBPJ'), PW1, the Pengarah Jabatan Kawalan Bangunan with MBPJ, and her subordinate PW2, a senior technician who prepared the letter to Tetuan A Jalil Sdn Bhd dated 14 March 2017 (p 636 Vol 1 of the appeal record), on the status of the CF for the subject premises, both confirmed that the five-storey office building had not been issued with a CF. According to the letter signed by PW1, there was an approved plan for the proposed construction of a four-storey building; however, the construction of the four-storey building was abandoned in 1985. The letter further stated that MBPJ did not know when the five-storey building was completed as that building has no CF. The letter also confirmed that based on MBPJ's record, there was no record of a CF being issued for the five-storey building, and there

was no correspondence between the building owner, the consultant, and MBPJ. As for the single-storey warehouse, PW1 confirmed in her letter that the CF was issued to Malayan Terrazzo Ltd. dated 11 June 1960 and one 'Sijil Perakuan Selesai Tambah Binaan', in 1974 for a store and cold room. On the 'Sijil Perakuan Selesai Tambah Binaan', PW2 confirmed that it is equivalent to CF for the additional building of the single-storey warehouse.

APPELLANT'S CASE

[7] The appellant was not aware that the five-storey building had no CF when entering the tenancy agreement with the previous owner. Damages, if any, should be based on the rental paid to the previous owner. DW1 was the appellant's registered valuer, who was called to comment on the methods employed by PW4 (registered valuer called by the respondent). In his oral testimony, DW1 commented that PW4's report was flawed as it was based on assumption with no reference to the building plan, and not based on the net lettable area. There was no suitable comparable. Further, the illegal structures and interest were also included in the valuation. The opinion of DW1 should be considered even though he did not tender his own report.

RESPONDENT'S CASE

[8] The CF issued to Malayan Terrazzo Ltd dated 11 June 1960 tendered through PW1 refers to the subject premises making no distinction between the single-storey warehouse and the five-storey building.

[9] The respondent relied on the valuation report by PW4 (pp 570–627 of Part C, Vol 2 of the appeal record) and a supplementary valuation report (at pp 628–640 of Part C, Vol 2 of the appeal record). The supplementary valuation report was to determine the market rental value for the subject premises with and without CF. A different valuation was put up for the structure with the CF and without CF, namely, RM2,848,648.80 without CF (both the single-storey warehouse and the five-storey building) and RM2,783,625.30 with CF (the single-storey warehouse). The gross monthly rental was valued at RM131,770.83 and RM128,763.02 respectively. There was no rebuttal valuation report produced by the appellant's valuer. Therefore, The High Court was correct in accepting the respondent's valuation.

[10] The user principle applied in this case as the appellant has benefitted from using the subject premises as their factory.

FINDINGS OF THE HIGH COURT

[11] His Lordship rejected the appellant's argument that the appellant did not rent the whole subject premises as the order for sale obtained by Affin Bank, the action against the appellant for vacant possession, and more importantly, the tenancy agreement with the previous owner, was for the whole of the subject premises.

[12] His Lordship had also rejected the argument on illegality concerning the part of the building with no CF, which should be excluded from the assessment. The reason being that His Lordship was of the view that the user principle applies to the case.

[13] On PW4's valuation report, His Lordship accepted PW4's opinion as an expert. His Lordship was satisfied that PW4 had considered the recognised methods of valuation and had come up with a separate valuation for the single-storey and the five-storey building in his suplementary valuation report. The methods are as provided in the Malaysian Valuation Standards. His Lordship opined that the appellant had not rebutted PW4's valuation report as the appellant has not tendered any valuation report.

[14] His Lordship rejected the opinion of DW1 on PW4's valuation report. The reasons being that DW1 did not enter the subject premises; hence, he was unable to conduct a careful and detailed examination of the subject premises as required by sub-r 76 (2) of the Valuer's Appraisers and Estate Agent Rules 1986, which states that in preparation for an appearance in court the valuers should make a careful and detailed examination of the property concerned after taking into consideration all relevant factors which might tend to influence the value.

ISSUES IN THE APPEAL

[15] The appellant raised three main issues in the memorandum of appeal, namely:

(a) whether the respondent is allowed to claim for the market rental for the entire subject premises despite the subject premises having an illegal structure under the Street, Drainage and Building Act 1974 ('the Act') and the Uniform Building By-Laws 1984 ('the UBBL');

(b) whether the valuation report dated 15 May 2017 and the supplementary valuation report dated 15 June 2017 are relevant for the court to consider; and

(c) whether the market rental for the subject premises should be determined solely based on the valuation report dated 15 May 2017 and the supplementary valuation report dated 15 June 2017.

[16] However, before us, the appellant's main contention was the issue of illegality of the five-storey building; whether the respondent is allowed to claim for the market rental for the entire subject premises despite a part of the subject premises being an illegal structure under the Act and UBBL.

APPELLANT'S SUBMISSION

[17] The dispute was in assessing damages on the value of market rental of the subject premises, which consists of a single-storey warehouse with the CF being issued and the five-storey building with no CF issued. The assessment was only for the assessment period namely, for 20 months and 20 days. Learned counsel for the appellant submitted that the respondent should not be allowed to claim for the market rental of the entire subject premises as part of the subject premises consisted an illegal structure under the relevant provisions of the Act and the UBBL. The contravention of the Act and the UBBL constitutes offence. The court should not consider the illegal act.

[18] On the valuation report by PW4, the valuation is flawed as it is based on the assumption that the whole subject premises has CF. PW4 admitted during cross examination that he did not know the net lettable area of the illegal structure namely the five-storey building. Learned counsel further submitted that PW4's supplementary valuation report would not assist the respondent as the valuation remained inclusive of the illegal structure (the five-storey building without the CF). Thus, the learned judge was wrong in awarding the market rental value of RM2,848,648.80 based on the supplementary valuation report. Any value to be given should be based on the legal structure only. Based on the previous tenancy rental of RM12,500 per month, learned counsel submitted that the market rental value should be based on RM12,500 per month. Therefore, for the period of 20 months and 20 days, the amount to be awarded is only RM258,000.

[19] The respondent relied heavily on the user principle based on this court decision in *Othman bin Ali & 290 Ors v Bukit Lenang Development Sdn Bhd* [2016] 3 MLJ 708 at p 718 and *Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram) v Chuan Seng Sdn Bhd* [2018] 5 MLJ 255. In accepting the respondent's submission on user principle, the learned judge had also fallen into error as in the two cases cited, no issue of illegality or illegal structure was involved.

RESPONDENT'S SUBMISSION

[20] During the assessment period, the appellant admitted to using the subject premises for their manufacturing purposes with 200 workers and heavy machineries latched to the underground gas pipes. Therefore, counsel submitted that the learned judge had correctly applied the user principle in the assessment of damages and the market rental for the subject premises based on the respondent's supplementary valuation report of RM131,770.83 per month, and also taking into account the market value of RM23m for an industrial land (with the area of 2.11 acres with main road frontage) within the heart of Petaling Jaya. The appellant's argument was merely an afterthought when they had in fact enjoyed using the subject premises for 20 months and 20 days without paying anything. The appellant must pay market rental value for the assessment period as they had fully utilised the subject premises for commercial gain.

[21] The appellant also admitted that they were not 'interrupted' by the local authority due to the CF issue. The appellant also had continued to have water, electricity and gas supply without interruption by the local authority, MBPJ. Upon becoming aware that CF was not issued for the five-storey building, PW4 revised his valuation in his supplementary valuation report for the total market value from RM30m to RM23m, a reduction of 23.33%, and the gross monthly rental was also reduced from RM171,875 to RM131,770 which was also a reduction of 23.33%. Consequently, the total market rental value for the assessment period was revised from RM3,720,699.90 to RM2,848,648.80. The reduction of the market value and the gross monthly rental of the subject premises took into account the costs of RM6,909,822.61 to legalise the five-storey building. Counsel submitted that the learned High Court judge was correct in accepting the respondent's supplementary valuation report based on His Lordship findings that PW4 had used the correct valuation method, namely the capitalisation of market income approach, the comparison method and the cost approach. Counsel further submitted that the appellate court should be slow to interfere with the award of damages. Counsel relied on the Federal Court case of *Tan Kuan Yau v Suhindrimani* [1985] 2 MLJ 22.

ANALYSIS AND DECISION

[22] The learned High Court judge allowed the respondent's claim for the market rental for the entire subject premises based on the valuation report dated 15 June 2016 and the supplementary valuation report dated 15 May 2017 for the sum of RM2,848,648.80 although there were clear statements from the respondent's witnesses, namely PW1 and PW2 that the five-storey office building has no CF with only the single-storey warehouse having an original CF issued in 1960 and the *Sijil Persiapan* for the additional

renovations/extensions carried out in the single-storey warehouse. PW2 confirmed that the *Sijil Persiapan* is equivalent to CF.

[23] We find that the High Court did not consider the illegality issue when awarding the property market rental value for the assessment period. His Lordship rejected the appellant's defence that the subject premises (the object of the contract) contained an illegal structure under the Act and the UBBL thereby, contravening s 24 of the Contract 1950.

[24] In our view, we cannot ignore the presence of illegality and the terms of s 24 of the Contracts Act 1950. It is well encoded in the said section that consideration or object of an agreement or contract cannot contravene a statute or if it is of such a nature that, if permitted, it would defeat any law. Section 24 of the Contract Act 1950 provides as follows:

> 24 *What considerations and objects are lawful, and what not*
>
> The consideration or object of an agreement is lawful, unless —
>
> (a) *it is forbidden by a law*;
>
> (b) *it is of such a nature that, if permitted, it would defeat any law*;
>
> (c) it is fraudulent;
>
> (d) it involves or implies injury to the person or property of another; or
>
> (e) the court regards it as immoral, or opposed to public policy.
>
> In each of the above cases, the consideration or object of an agreement is said to be unlawful. Every agreement of which the object or consideration is unlawful is void.

[25] Under sub-s (1) of s 70 of the Act, it is provided that no person shall erect any building without the prior written permission of the local authority. Any person who commenced an erection of a building in contravention of the Act shall be guilty of an offence and shall be liable on conviction to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both and shall also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction as provided under para (c) of sub-s (13) of s 70 of the Act. For the purposes of this section, para (f) of sub-s (16) provides that any departure either before or after the completion of the building in any particular form from any plan or specification approved by the local authority at any time in respect of such building also constitutes erection of a building. For convenience, we reproduce sub-s (1) and para (c) of sub-s (13) and para (f) of sub-s 16 of s 70 of the Act as follows:

> 70 Notice of new buildings
>
> (1) *No person shall erect any building without the prior written permission of the local authority.*

...

(13) *Any person who* —

(a) commences or resumes the erection of a building in contravention of subsection (9);

(aa) commences the erection of a building in contravention of subsection (9A);

(b) deviates from any plan or specification approved by the local authority without the prior written permission of the local authority;

(c) *erects a building in contravention of this Act or of any of the by-laws made thereunder*; or

(d) fails to comply with any lawful order or written direction of the local authority or with any term or condition attached by the local authority to any modification or waiver of any of the requirements of any by-law,

shall be liable on conviction to a fine not exceeding fifty thousand ringgit or to imprisonment for a term not exceeding three years or to both and shall also be liable to a further fine of one thousand ringgit for every day during which the offence is continued after conviction. (Emphasis added.)

...

(16) *For the purposes of this section* and of section 75 *a person shall be deemed to erect a building who* —

(a) begins work on the site thereof for or in respect of a new building;

(b) *adds to or alters any existing building in such a manner as to involve* —

(i) new foundations; or

(ii) *new or partly new or increased superstructure or roof on existing walls or existing foundations*;

(c) converts into a dwelling-house any building not originally constructed for human habitation;

(d) converts into more than one dwelling-house a building originally constructed as one dwelling-house;

(e) converts to other purposes a house originally constructed as a dwelling-house;

(f) *departs either before or after the completion of the building in any particular form from any plan or specification approved by the local authority at any time in respect of such building*;

(g) infringes the provisions of this Act or any by-laws relating to buildings;

(h) renews or repairs any existing building in such a manner as to involve a renewal, reconstruction or erection of any portion of an outer or party wall to the extent of one storey in height whatever the material of such outer or party wall is;

(i) demolishes and reconstructs or adds to a building in such a manner as to involve more than —

(i) half the superficial area of walls and partitions; or

(ii) half the superficial area of floors (excluding ground floor) or roofs; or

A (j) constructs an additional storey or storeys, or renews, reconstructs or erects an outer or party wall of the first, second or third storey counting from the ground, to the extent of one storey in height:

Provided that, for the purposes of subsection (2) and for the purposes of section 75 a person who executes or does any of the works or things specified in subparagraph B (b)(ii), paragraph (f), (g) or (h) of this subsection shall not be deemed to erect a building.

The expression 'erection of a building' shall be construed accordingly.

Works executed on the same building on two or more occasions within ten years may be deemed to be one reconstruction and aggregated for purposes of this C definition. (Emphasis added.)

[26] The building owner is also subjected to the UBBL, subsidiary legislation made by the Minister under s 33 of the Act. Under by-laws 3, 10, 25, D 25A and 28 of the UBBL, apart from compliance with the Act, the building owner is required to comply with the requirements of the provisions under the UBBL in relation to a building plan and the issuance of the CF by the local authority. No person shall occupy or is permited to occupy any building or any part thereof, unless a CF has been issued under these By-Laws for such E building. Failure to comply with these By-Laws shall render such person liable to prosecution under the Act as provided under by-law 28 of the UBBL. For convenience we reproduce by-law 28 of the UBBL as follows:

28 Offence under the Act

F (1) *No person shall occupy* or permit to be occupied *any building* or any part thereof, other than a singly built detached house, *unless a certificate of fitness for occupation*, a partial certificate of fitness for occupation or a temporary certificate of fitness for occupation *has been issued under these By-laws for such building* and *any failure to comply with this by-law shall* G *render such person liable to prosecution under the Act*.

(2) No person shall occupy or permit to be occupied any singly built detached house unless a certificate of completion and compliance has been issued under these By-laws for the singly built detached house and any failure to comply with this paragraph shall render such person liable to prosecution H under the Act.

[27] The conditions to be fulfilled by the building owner before any CF can be issued are provided under by-law 25. The requirements of approval of plans I by the local authority are provided under by-laws 3 and 10. Clearly, for the erection of a particular building to be legal and before such building may be occupied, the relevant plan must be approved and CF must be issued by MBPJ. Otherwise, the erected structure will be illegal.

[28] In this case before us, based on the evidence of PW1 and PW2, there was no approval applied for or plan submitted to MBPJ by the owner for the erection of a five-storey building even though there was an earlier approval for a four-storey building. Besides no approval for the plan, there was also no CF issued after the five-storey building had been erected.

[29] From the evidence of PW1 and PW2, clearly, the subject premises, which consists of a five-storey office building, amounts to an illegal structure with no approved plan and CF. It is also pertinent to note that in Appendix C of the supplementary valuation report dated 15 June 2016 prepared by PW4 (p 640 of the appeal record), PW4 had included the sum of RM6,909,822.61 being the 'costs to legalise the building' in the valuation. Having to include the 'costs to legalise the building' in the first place clearly acknowledges and confirms that the subject premises contained illegal structure.

[30] In *Network Foods (M) Sdn Bhd v Syabinas Holdings Sdn Bhd & Anor* [1997] MLJU 206; [1997] 4 CLJ 49, His Lordship Abdul Wahab Patail J (as he then was) had held that a building that did not possess a CF, is clearly in breach of by-law 28 of the UBBL and the building could not be occupied. It was also established that the owner of the illegal building is not entitled to receive rental from the tenant.

[31] In the Federal Court case of *Singma Sawmill Co Sdn Bhd v Asian Holdings (Industrialised Buildings) Sdn Bhd* [1980] 1 MLJ 21; [1979] 1 LNS 96 it was held that 'it is contaminated by *turpis causa* and that rule has long been established that *ex turpis causa oritur non actio* — no person can claim any right or remedy whatsoever under an illegal transaction in which he has participated'. The courts do not overlook the fact that they do not assist a person with unclean hands.

> *... Thus in the case of a lease known to the lessor to be illegal, he cannot sue for the recovery of rent, since to substantiate his claim he must necessarily rely upon the illegal transaction.*

[32] Similarly, in *Lee Nyan Hon & Bros Sdn Bhd v Metro Charm Sdn Bhd* [2009] 6 MLJ 1; [2009] 6 CLJ 626 where the court held with regard to the maxim of *ex turpis causa oritur non actio* that 'This is clear and well recognised legal maxim is founded in good sense. *No court will enforce an illegal contract or transaction which is illegal* and the illegality is duly brought to the notice of the court, and the person invoking the aid of the court is himself implicated in the illegality'.

[33] The principle in *Singma Sawmill* was also adopted by the court in *Senga Engineering & Construction Sdn Bhd v Richwin Holdings (M) Sdn Bhd* [2016] MLJU 1902; [2016] 7 CLJ 463 where it was held that the plaintiff in that case

A was not entitled to claim payment for work done because it was declared that the house built by the plaintiff was illegal, every stage of the building works was carried out illegally. A cause of action that is founded on illegal act will not succeed.

B **[34]** We also find support in the Supreme Court decision in *Lim Kar Bee v Duofortis Properties (M) Sdn Bhd* [1992] 2 MLJ 281; [1992] 1 CLJ Rep 173; [1992] 3 CLJ 1667. In *Lim Kar Bee* the former Supreme Court per Peh Swee Chin FCJ (as he then was), delivering the judgment of the court, said:

C > [33] Courts have always set their face against illegality in any contract. *It is very well settled that the courts take judicial notice of such illegality and refuse to enforce the contract,* and such judicial notice may be taken at any stage, either at the court of first instance or at the appellate stage irrespective of whether illegality is pleaded or not where the contract is ex facie illegal.
>
D > When the contract is not ex facie illegal, then on the question of pleadings, there is only one situation where illegality need not be pleaded when the court can still take judicial notice of illegality and refuse to enforce it. *The situation is when facts which have not been pleaded emerge in evidence in the course of the trial showing clearly the illegality, eg the illegal purpose of the contract, or its illegal consideration,* with the
E > presence of all relevant circumstances, see eg *Palaniappa Chettiar v Arunasalam Chettiar*, *Leong Poh Chin v Chin Thin Sin*, and *North Western Salt Co Ltd v Electrolytic Alkali Ltd* just to mention a few. *The existence of such a situation in the instant appeal is warranted by the facts that emerged in evidence, including affidavit evidence*. (Emphasis added.)

F **[35]** In our case, the facts on illegality emerged during the oral evidence of the respondent's witnesses from the local authority (MBPJ), namely PW1 and PW2. The appellant was not aware when they entered the tenancy agreement with the previous owner. However, during the oral submission, appellant's
G counsel has made a concession that, if the respondent was to be liable, the amount should be based on the monthly rental that the respondent had with the previous owner that was only RM12,500 per month and considering that only the single-storey warehouse had been issued with the CF. Counsel submitted, the amount of damages, if any, should be only nominal damages of
H RM258,000 (RM12,500 x 20 months and 20 days) based on the rental with the previous owner.

[36] Therefore, in our view, the respondent should not be allowed to claim for the market rental for the entire subject premises as part of it contained an
I illegal structure under the Act and the UBBL.

[37] In our view, His Lordship fell into error when he concluded that the respondent was allowed to claim for the market rental for the entire subject premises, which consists of the five-storey office building and the single-storey

warehouse where the evidence led show that the five-storey building is an illegal structure. It is also our view that the facts of this case fell squarely within the provisions of para 2, (a) and (b) of s 24 of the Contract Act 1950.

[38] We cannot ignore the presence of illegality and the provision of s 24 of the Contracts Act 1950. We find that the learned judge was in error in awarding RM2,848,648.80 as damages given the illegality and the circumstances as explained in the foregoing. We agree with the submissions of learned counsel for the appellant on the issue of illegality. We find merits in the appeal.

[39] Premised on illegality, we agree with the submission of learned counsel for the appellant that the user principle based on cases of *Othman bin Ali* and *Amm a/l Joy (suing as Chairman Committee Members of Wat Boonyaram)* relied upon by the respondent do not apply in this case. In *Othman bin Ali*, the issue was trespass on the land. The case had nothing to do with an illegal structure. In accepting the respondent's submission on the user principle, the learned judge had also fallen into error as no issue of illegality was involved in those two cases. We concluded that His Lordship had erred in his findings by not considering the issue of illegality and by accepting the application of the user principle, which warranted appellate intervention (*Gan Yook Chin (P) & Anor v Lee Ing Chin @ Lee Teck Seng & Ors* [2005] 2 MLJ 1; [2004] 4 CLJ 309 (FC) at p 320).

[40] Thus, our above conclusion disposes of the appeal without the necessity of dealing with other secondary issues canvassed before us. We, therefore, allowed the appeal. We varied the amount of damages awarded to the sum RM258,000 as conceded by the appellant. We enter that sum as damages for the respondent together with interest at 5%pa from the date of judgment to the date of realisation. We make no order as to costs.

Appeal allowed.

Reported by Ahmad Ismail Illman Mohd Razali